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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER OF FIRSTSOUTH, F.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS IN SUPPORT OF PETITIONER

INTEREST OF UNITED STATES LEAGUE OF SAVINGS INSTITUTIONS

This Brief is filed in support of Petitioner Coit Independence Joint Venture [1] and in the interest of the United States League of Savings Institutions ("U.S. League"), which arises from its being a membership institution whose members include federal- and state-chartered savings associations and savings banks ("savings institutions") with deposits insured by Respondent Federal Savings and Loan Insurance Corporation ("FSLIC") and which are subject to regulation by FSLIC and its operating head the Federal Home Loan Bank Board ("FHLBB").[2]

Resolution of the issues in this case and of the conflicts among the courts will have a substantial impact on the economic interests of U.S. League members, on their ability to attract and keep deposits, on their home mortgage and other lending and on their participation in secondary mortgage markets.[3] The soundness and stability of savings institutions depend to a significant extent on their ability to resell mortgages and other loans that they originate, either as whole loans or in the form of loan participations. The uncertainties now surrounding

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[1] Counsel for Petitioner and for Respondent have consented to the filing of this Brief. Their letters of consent are on file with the Clerk of the Court.

[2] Member savings institutions are located in every state, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and the Pacific territories of the United States. These more than 3,200 members held approximately 96 percent of the $1.25 trillion of savings institutions' assets and of the $933 million of FSLIC-insured deposits available on December 31, 1987.

[3] Adverse effects on member savings institutions in turn impair the opportunities for families and individuals to obtain financing for their purchases of homes and other housing.

the obtaining of meaningful protection as a claimant in an FSLIC receivership, which have been created by Respondent's position that it possesses exclusive jurisdiction to determine the validity of all such claims, impair the ability of U.S. League members to resell loans and participations at full value. Questions of procedure, due process and delay in the administrative claims determination process, the virtual absence of statutory guidance and protections in connection with Respondent's self-proclaimed authority and constitutional concerns attending Respondent's position combine to impede fuller participation by U.S. League members in these secondary markets as buyers and as sellers.[4]

Thus, the U.S. League and its members are vitally interested in the outcome of this case not only because the receivership provisions of the Home Owners' Loan Act of 1933 and National Housing Act of 1934 are part of the regulatory framework in which they exist, but also because U.S. League members are claimants of FSLIC receiverships and because third parties with whom U.S. League members do business are concerned that their rights as potential claimants in FSLIC receiverships would not be adequately protected.

SUMMARY OF ARGUMENT

This case reviews an appeal affirming the dismissal by a United States district court for lack of subject matter jurisdiction of claims for usury, breach of fiduciary duty and breach of the implied duty of good faith and fair dealing in connection with loans made by FirstSouth, F.A., to petitioner. The decision relies on the authority of *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986), a case that has given rise to "the *Hudspeth* doctrine."

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[4] *See generally* Pfeiler, *FSLIC Adjudication of Claims Against Receiverships: Has the Search for Efficiency Lost Sight of Due Process?* 53 LEGAL BULL. 433, 448-57 (1987) (comparing treatment in sectors of secondary markets involving various types of financial institutions).

The *Hudspeth* doctrine—that no state or federal court may any longer determine the validity of claims against a savings institution for which FHLBB has appointed FSLIC receiver—is not supported by statutory authority or legislative history. The language, structure and legislative history of the relevant statutes indicate congressional intent that FSLIC enjoy the usual powers of a receiver to liquidate the estate, but do not indicate an intention to entrust FSLIC as receiver with unique power as the exclusive adjudicator of claims and disputes or to strip state and federal courts of traditional subject matter jurisdiction. To the contrary, the statutes devote detailed attention to the allocation of jurisdiction between state and federal courts (over the very matters on which FSLIC contends it was granted exclusive authority); to court access as a protection against administrative power; to administrative hearing requirements; and to provisions for judicial review of administrative determinations. Congress indicated no desire to strip state and federal courts of the subject matter jurisdiction to determine the validity of claims. *See, e.g., Morris v. Jones*, 329 U.S. 545 (1946); *Riehle v. Margolies*, 279 U.S. 218 (1929).

In connection with the liquidation of insured savings institutions, Congress provided FSLIC with traditional receivership authority to collect assets and to settle, compromise or release claims in favor of or against the insured institution. 12 U.S.C. § 1729(d) (1982). The statute did not suggest, and Congress did not intend, massive dislocation of judicial power to determine the validity of claims. The *Hudspeth* doctine, as it has been applied to a vast array of state and federal statutory and common law claims to require dismissal from court for lack of subject matter jurisdiction, is not authorized by federal law.

Congress provided a specific method for the prompt challenge before the United States courts of FHLBB's appointment of a receiver, 12 U.S.C. § 1464(d)(6)(A) (1982), and sought to protect the receiver from other

challenges to its authority or collateral actions that would substantially interfere with its conducting the receivership. *Id.* § 1464(d)(6)(C). The statute does not say, and its legislative history does not suggest, that Congress thereby intended to divest state and federal courts of subject matter jurisdiction to determine the validity of claims and resolve disputes within their competence.

Almost 20 years after the enactment of these provisions, FHLBB began to reinterpret them as if they allocated to FSLIC and FHLBB exclusive authority to determine all claims and disputes involving FSLIC receiverships. Since FSLIC is generally the largest creditor of the receivership, however, this scheme creates conflicts of interest. Respondent's financial interest in preserving and replenishing its insurance fund conflicts with its self-declared role as judge of the validity of the competing claims of other creditors. This constitutional due process concern is additional reason for the Court to construe the statutory authority strictly in accordance with its language and legislative history, to reject the *Hudspeth* doctrine and to reverse the decision of the Court of Appeals.

ARGUMENT

I. A Wide Variety Of Actions Is Being Affected By The Hudspeth Doctrine.

Respondent takes the position that the *Hudspeth* doctrine encompasses any and all types of claims made against an institution in FSLIC receivership.[5] In its most recently published "interim procedures," FSLIC defines "claim" broadly as "the assertion of a right to payment or other relief against an association or the receiver" and includes demands for recoupment, setoff, security and opposition to foreclosure by the receiver, as

[5] The FSLIC has even sought to apply the *Hudspeth* doctrine to claims for deposit insurance, but with mixed results. *Compare Jugum v. FSLIC*, 637 F. Supp. 1045, *reconsideration denied*, 646 F. Supp. 764 (W.D. Wash. 1986) *with Baskes v. FSLIC*, 649 F. Supp. 1358 (N.D. Ill. 1986).

well as wages, salaries and employment benefits. 53 Fed. Reg. 13,105, 13,106 (I.B.9.a. definition of "claim") (Apr. 21, 1988).

Since the *Hudspeth* decision three years ago, FSLIC has successfully invoked this preclusive doctrine to require state and federal courts to dismiss a staggering array of actions for lack of subject matter jurisdiction. Such matters range from simple to complex tort[6] and contract[7] claims commenced against the institution before the declaration of receivership. In addition, FSLIC has successfully urged the dismissal for lack of subject matter jurisdiction of claims alleging discrimination,[8] antitrust violation[9] and racketeering.[10] Respondent has taken the position, not always successfully, that claims of state and federal securities law violations cannot be heard by the courts.[11] Thus, express congressional grants of subject matter jurisdiction over federal claims are being overridden[12] and FSLIC and FHLBB are taking onto themselves responsibility for applying the entire body of state and federal statutory and common law.[13]

[6] *E.g., Union County Bank v. Knox Capital Corp.*, No. 657 (Tenn. Ct. App. Apr. 18, 1986); *Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986).

[7] *E.g., Quackenbush v. Audubon Fed. Sav. & Loan Ass'n*, No. 86-2470 (E.D. La. Jan. 12, 1987); *Thomes v. Equitable Sav. & Loan Ass'n*, 831 F.2d 558 (5th Cir. 1987).

[8] *Resna Assoc. v. Fin. Equity Mortgage Corp.*, 673 F. Supp. 1371, 1372 (D.N.J. 1987).

[9] *Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987).

[10] *E.g., Lyons Sav. & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387 (7th Cir. 1987); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987).

[11] *E.g., Lyons Sav. & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387 (7th Cir. 1987); *Baer v. Abel*, 637 F. Supp. 347 (W.D. Wash. 1986). *But see FSLIC v. Provo Excelsior, Ltd.*, 664 F. Supp. 1405 (D. Utah. 1987).

[12] 15 U.S.C. §§ 4, 77v, 77aa (1982); 18 U.S.C. § 1964 (1982).

[13] *See In re Miller Dev. Corp.*, 71 Bankr. 460 (Bankr. M.D. La. 1987).

Further, security interests in liens are overridden,[14] and all assets, even those whose rightful ownership remains a matter of dispute, are subject to transfer.[15] In each case, all manner of right and interest are thereby reduced to those of a claim before FSLIC and FHLBB.[16]

The potential array of claimants includes owners of participation interests in loans originated by the institution in receivership or loans in which such institution is a participant,[17] borrowers,[18] creditors,[19] guarantors, lienholders[20] and, indeed, anyone seeking monetary damages or equitable relief from the institution or its re-

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[14] *E.g., Chupik Corp. v. FSLIC*, 790 F.2d 1269 (5th Cir. 1986); *Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987).

[15] *E.g., Keller v. Antioch Sav. & Loan Ass'n*, 143 Ill. App. 3d 278, 492 N.E.2d 937 (1986).

[16] In its 1985 proposed regulations, FHLBB provided assurance that certain types of participation interests in loans originated by the savings institution in FSLIC receivership were outside the liquidation process. 50 Fed. Reg. 48,970, 48,980-91, 48,995 (to be codified at 12 C.F.R. § 569c.10) (proposed Nov. 27, 1985). In its more recent "interim procedures," FHLBB concedes only that FSLIC "*may* recognize the holder of a participating interest in a loan in which the Receiver also holds a participating interest, or which the Receiver services, as one having an ownership interest and not a creditor of the insured institution in receivership." 53 Fed. Reg. 13,105, 13,106 (Apr. 21, 1988) (emphasis added). The matter is now left to the discretion of the receiver and FHLBB.

[17] *E.g., Peoples Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 677 F. Supp. 1104 (D. Kan. 1988); *Peninsula Fed. Sav. & Loan Ass'n v. FSLIC*, 663 F. Supp. 506 (S.D. Fla. 1987).

[18] *E.g., Red Fox Indus., Inc. v. FSLIC*, 832 F.2d 340 (5th Cir. 1987); *FSLIC v. Kennedy*, 732 S.W.2d 1 (Tx. Ct. App. 1987).

[19] *E.g., Acquisition Corp. of Am. v. Sunrise Sav. & Loan Ass'n*, 659 F. Supp. 138 (S.D. Fla. 1987); *FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987).

[20] *E.g., Modern Supply Co. v. FSLIC*, 50 Wash. App. 194, 748 P.2d 251 (1988); *FirstSouth, F.A. v. LaSalle Nat'l Bank*, No. 86-10247 (N.D. Ill. Sept. 4, 1987).

ceiver.[21] 53 Fed. Reg. at 13,106-07 (I.B.10. definition of "claimant").

The procedural settings in which FSLIC seeks dismissals are unlimited. Whether complaint,[22] counterclaim,[23] crossclaim,[24] setoff[25] or recoupment, the claim is automatically a subject for an FSLIC motion to dismiss for lack of subject matter jurisdiction. Modern principles of judicial economy and evenhandedness are sacrificed as FSLIC is permitted to proceed in court for determination of liabilities and for enforcement and injunctive assistance while its party opponents are relegated to petitioning FSLIC and FHLBB for determinations of the validity of claims arising from the conduct and obligations of the failed institution.[26]

In *Grant v. Buckner*, 172 U.S. 232 (1898), this Court upheld a setoff against a receiver and rejected the contention that the federal receiver, appointed by a circuit court, should not be subject to a counterclaim in state court: "The receiver voluntarily went into the state court, and, having voluntarily gone there, cannot question the right of that court to determine the controversy between himself and the defendant." *Id.* at 238.[27] The principles

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[21] *E.g., E.g., Thomes v. Equitable Sav. & Loan Ass'n*, 831 F.2d 558 (5th Cir. 1987); *Bailey v. Metro Fed. Sav. & Loan Ass'n*, 642 F. Supp. 616 (W.D. La. July 28, 1986).

[22] *FSLIC v. Oldenberg*, 658 F. Supp. 609 (D. Utah. 1987).

[23] *E.g., FSLIC v. Quality Inns, Inc.*, 650 F. Supp. 918 (D. Md. 1987); *Baer v. Abel*, 649 F. Supp. 25 (W.D. Wash. 1986).

[24] *Politser v. Rosch*, No. 86-0076 (N.D. Ill. June 26, 1986).

[25] *FSLIC v. Ziegler*, No. 86-5297 (E.D. La. Jan. 20, 1988).

[26] As receiver, FSLIC has even argued that affirmative defenses not amounting to claims must be dismissed for lack of subject matter jurisdiction. *FSLIC v. Ziegler*, No. 86-5297 (E.D. La. Jan. 20, 1988).

[27] *See Alexander v. Hillman*, 296 U.S. 222, 241-42 (1935) (receivership court may entertain counterclaim against claimant); *cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (discussing benefits of allowing counterclaim practice).

of fairness, efficiency and comprehensiveness in the adjudication of disputes that support the result in *Buckner* are being ignored by application of the *Hudspeth* doctrine to counterclaims, setoffs and recoupments. Defendants are being put to the burden of multiple proceedings and the risk of inconsistent determinations.

In addition, claims whose validity has been determined by a state or federal court at the time of the receivership are being required to be determined anew as receivership claims by application of the *Hudspeth* doctrine.[28] Adverse court determinations are appealed, sometimes removed from state court to the federal system,[29] but always subject to FSLIC's contention that the action be dismissed for lack of subject matter jurisdiction. Court-approved settlements are abrogated with impunity [30] and jury verdicts may be ignored.[31]

The *Hudspeth* doctrine would curtail the jurisdiction of the federal courts and preempt that of the state courts to determine the validity of claims. Despite the lack of any special expertise on the part of FSLIC, FHLBB and their special representatives, decisionmaking authority is being dislocated to them from its traditional repositories. This result is the unavoidable consequence of the

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[28] *FSLIC v. Superior Court of San Joaquin County*, 180 Cal. App. 3d 336, 225 Cal. Rptr. 422 (1986), *cert. denied sub nom. American Sav. & Loan Ass'n v. FSLIC*, 107 S. Ct. 949 (1987); *Crockett v. FSLIC*, No. 86-195 (Tenn. Ct. App. 1986); *Union County Bank v. Knox Capital Corp.*, No. 657 (Tenn. Ct. App. 1986).

[29] *E.g., In re FSLIC*, 837 F.2d 432 (11th Cir. 1988); *Vernon Sav. & Loan Ass'n v. Commerce Sav. & Loan Ass'n*, 677 F. Supp. 495 (N.D. Tx. 1988).

[30] *FSLIC v. Bonfanti*, 826 F.2d 1391 (5th Cir. 1987), *petition for cert. filed sub nom. Zohdi v. FSLIC*, 56 U.S.L.W. 3196 (Aug. 5, 1987) (No. 87-255).

[31] *Homestead Sav. v. Life Sav. of Am.*, 668 F. Supp. 1121 (N.D. Ill. 1987) (district court's judgment refusing to vacate jury verdict reported in advance sheets as Slip Op. No. 86-20268 (July 1, 1987), withdrawn from bound volumes of reported decisions after settlement required decision to be vacated).

Hudspeth doctrine, which is stated in absolute terms of subject matter jurisdiction rather than in discretionary principles of exhaustion.

II. The Home Owners' Loan Act Of 1933 And National Housing Act Of 1934 Do Not Give FSLIC The Authority To Divest State And Federal Courts Of All Subject Matter Jurisdiction To Determine The Validity Of Claims Against Institutions In FSLIC Receivership.

A. *The Home Owners' Loan Act of 1933 and National Housing Act of 1934 as Amended Through 1954.*

Since 1933 FHLBB has had authority to appoint receivers for institutions it regulates and, since its establishment in 1934, FSLIC has had authority to act as receiver. In 1966, as will be discussed, Congress provided procedural safeguards in connection with the declaration of federal receiverships. Almost 20 years later, FSLIC began asserting that by these provisions Congress divested state and federal courts of all subject matter jurisdiction over claims against institutions for which FHLBB appoints FSLIC receiver. Since 1984, FSLIC has argued that sections 1464(d)(6)(C) and 1729(d) of title 12 of the *United States Code* strip the federal courts and preempt the state courts of their traditional judicial authority to determine the validity of claims. Read and understood in context and in light of their legislative history, these statutory sections do not support FSLIC's argument.

The statutory framework begins with the enactment of the Federal Home Loan Bank Act in 1932, which established the Federal Home Loan Bank Board and a system of regional home loan banks to provide an additional source of funds for local, state-chartered thrift institutions then engaged primarily in lending for home mortgages. Pub. L. No. 72-304, 47 Stat. 725 (1932).

As the economy worsened, Congress passed the Home Owners' Loan Act of 1933. Pub. L. No. 73-43, 48 Stat.

128 (1933). This statute empowered FHLBB to charter federal mutual thrift associations and, again, sought to provide additional sources of funds for mortgages. The Home Owners' Loan Act of 1933 provided that federally-chartered thrifts and state-chartered thrifts that converted to federal charter would be regulated by FHLBB. Included in the Act was authority for FHLBB "to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same." Pub. L. No. 73-43, § 5(d), 48 Stat. 128, 133 (1933).

Congress next enacted the National Housing Act of 1934, title IV of which established a system of deposit insurance and created the Federal Savings and Loan Insurance Corporation. Pub. L. No. 73-479, 48 Stat. 1246 (1934). From its inception, FSLIC had authority "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." Pub. L. No. 73-479, tit. IV, § 402(c)(4), 48 Stat. 1246, 1256 (1934).

The 1934 Act included a section on liquidation of insured institutions. Pub. L. No. 73-479, tit. IV, § 406, 48 Stat. 1246, 1259-60 (1934). Initially, in the event that a federally-chartered association was in default in the payment of insurance premiums, FSLIC was to be appointed conservator or receiver and was empowered to take over the assets of the association, to operate the association, to take action to put it in sound and solvent condition, to merge the association into another, to organize a new federal association to take over its assets or "to proceed to liquidate its assets in an orderly manner, whichever shall appear to be the best interests of the insured members of the association in default." *Id.* § 406(b), 48 Stat. 1246, 1260 (1934). With respect to state-chartered associations, FSLIC was authorized to act as conservator, receiver or other legal custodian if appointed by the court or other public authority having the power of appointment. *Id.* § 406(c), 48 Stat. 1246, 1260.

In either case, Congress provided:

> In connection with the liquidation of insured institutions in default, the Corporation shall have the power to carry on the business of and to collect all obligations to the insured institutions, *to settle, compromise, or release claims in favor of or against the insured institutions*, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

Id. § 406(d), 48 Stat. 1246, 1260 (1934) (codified at 12 U.S.C. § 1729(d) (1982)) (emphasis added).[32]

There is no indication in the reports, debates or hearings leading to the 1933 and 1934 Acts that Congress intended to devise any new allocation of power divesting the courts of their traditional jurisdiction to determine the validity of claims. The House Report on the National Housing Act of 1934 observes:

> Adequate provision is made for the liquidation of insured institutions somewhat similar to the plan for the liquidation of banks which are under Federal deposit insurance.

H.R. Rep. No. 1922, 73d Cong. 2d Sess. 4 (1934).[33]

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[32] In 1982, the last clause of this provision was amended to read: "subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority." Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, tit. I, § 122(g), 96 Stat. 1469, 1482 (1982). In 1987, this change was made permanent. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, tit. V, § 509(a), 101 Stat. 552, 635 (1987).

It is this section that the Fifth Circuit in *Hudspeth* erroneously stated was added to the statute in 1968. *Hudspeth*, 756 F.2d at 1101 n.2.

[33] In earlier hearings before the House Committee on Banking and Currency, the General Counsel of FHLBB had likewise testified that the insurance payment options of FSLIC as receiver were "substantially the same thing as in the Bank Deposit Insurance Corpo-

There is no hint, indication or expression in the legislative history that the authority of FSLIC to "settle, compromise, or release claims in favor of or against the insured institutions" was intended to include exclusive subject matter jurisdiction to adjudicate the validity of all claims.[34]

Further, in the Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590 (1954), Congress amended the Home Owners' Loan Act's receivership provisions. Congress added an express provision empowering FHLBB "to sue or be sued, complain and defend in any court of competent jurisdiction in the United States." *Id.* § 503, 68 Stat. at 635. It added specific notice and administrative hearing requirements for exercise of FHLBB's "exclusive jurisdiction" to appoint a receiver, requiring that there

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ration legislation." Statement of Horace Russell, General Counsel, FHLBB, *Hearings on H.R. 9620 Before the House Committee on Banking and Currency*, 73d Cong., 2d Sess. 15, 18 (Comm. Print 1934).

During consideration in the House, Rep. Williams observed that the FSLIC plan generally "is analogous to the bank-deposit insurance provided at the last session." 78 Cong. Rec. 11,199-200 (1934).

The Comptroller of the Currency has not claimed exclusive subject matter jurisdiction to adjudicate claims against institutions in receivership under its "somewhat similar" authority. Indeed the Comptroller was then and is now to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been provided to his satisfaction *or adjudicated in a court of competent jurisdiction.*" 12 U.S.C. § 194 (1982) (emphasis added). *See United States ex rel. White v. Knox*, 111 U.S. 784 (1884); *Earle v. Pennsylvania*, 178 U.S. 449 (1900); *First Empire Bank v. FDIC*, 572 F.2d 1361, 1371 (9th Cir. 1978), *cert. denied*, 439 U.S. 919 (1978).

[34] *See Deep Rock Oil Corp. v. Salisbury*, 130 F.2d 387 (8th Cir. 1942); *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705 (8th Cir. 1942); *Town of Texhoma ex rel. Versluis v. Nield*, 9 F.R.D. 739 (W.D. Okla. 1943). *See generally* Pfeiler, *FSLIC Adjudication of Claims Against Receivership: Has the Search for Efficiency Lost Sight of Due Process?* 53 LEGAL BULL. 433, 465-67 n.119 (1987); Barse, *A Summary of the Procedure and Principles Relating to the Liquidation of National Banks in Receivership*, Fed. B.A.J. I:3-10, 60 (1932).

be an opportunity for an administrative hearing in accordance with the Administrative Procedure Act and that there be judicial review, as therein provided, upon the weight of the evidence, *id.* 68 Stat. at 636.

B. *The Financial Institutions Supervisory Act of 1966.*

In 1966, Congress passed the Financial Institutions Supervisory Act and enacted the next significant amendments to the Home Owners' Loan Act of 1933 and National Housing Act of 1934. Pub. L. No. 89-695, 80 Stat. 1028 (1966). At the request of the Treasury Department, Federal Reserve Board, Federal Deposit Insurance Corporation and FHLBB, Congress provided intermediate remedial authority less drastic than seizure of the financial institution or termination of deposit insurance. The main thrust of the 1966 amendments was to authorize administrative cease-and-desist proceedings and removal and suspension of officers and directors.[35]

This legislation provided precise avenues for judicial review of all such administrative actions. The need for judicial review was a principal theme of the hearings, *see 1966 Senate Hearings* 15-16, 24-25; *1966 House Hearings* 31-32, 99, 107. Indeed, it is significant that in these 1966 amendments Congress devoted a high degree of care and attention to matters of procedure and court access.

In connection with the new cease-and-desist power granted FSLIC, an administrative hearing is required to be noticed, 12 U.S.C. § 1730(e)(1)(1982), and conducted in accordance with the Administrative Procedure Act,

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[35] *See Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 13 (1966) (statement of John E. Horne, Chairman, FHLBB) ["*1966 Senate Hearings*"]; *Financial Institutions Supervisory and Insurance Act of 1966: Hearings on S. 3158 & S. 3695 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 36 (1966) (statement of John E. Horne, Chairman, FHLBB) ["*1966 House Hearings*"].

id. § 1730(j)(1). Parties have the right to seek review by the United States Court of Appeals. *Id.* §§ 1464(f)(2), 1730(j)(2). A similar structure is expressly made applicable to removal or prohibition of an officer or director. *Id.* §§ 1464(d)(4)(E), 1464(d)(7), 1730(g)(5), 1730(j). With respect to FSLIC orders that require immediate effectiveness, see 12 U.S.C. §§ 1464(d)(3)(A), 1464(d)(4)(D), 1730(f)(1), 1730(g)(4), the affected party is accorded an additional immediate opportunity to apply to a United States district court for relief from such orders pending the completion of administrative proceedings. *Id.* §§ 1464(d)(3)(B), 1464(d)(4)(F), 1730(f)(2), 1730(g)(6).

Also in 1966, Congress added language to the enforcement section of the National Housing Act of 1934 that expressly allocates between federal and state courts jurisdiction over adjudication of various types of claims in the receivership of a state-chartered institution:

> *Provided*, That any action, suit, or proceeding to which the Corporation [FSLIC] is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States.

Pub. L. No. 89-695, tit. I, § 101, 80 Stat. 1028, 1042 (1966) (codified at 12 U.S.C. § 1730(k)(1) (1982).[36] This language reserves for state court adjudication matters in which FSLIC is a party in its capacity as receiver for a state-chartered institution and that involve only the state law rights or obligations of investors, creditors, stockholders and the institution. *See* 112 Cong. Rec. 6,885, 6,892 (1966). This provision reflects congressional deference to state court authority in state law

[36] This language is an exception to the general rule that actions in which FSLIC is involved as a receiver arise under federal law and may be removed to federal court. *See* 12 U.S.C. § 1730(k)(1)(B), (C) (1982).

matters and, contrary to the *Hudspeth* doctrine, remains in full effect and force. *See FSLIC v. Ticktin*, 832 F.2d 1438 (7th Cir. 1987); *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1220-21 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Associates*, 56 U.S.L.W. 3249 (U.S. July 8, 1987) (No. 87-451).

Finally, it was in 1966 that the other statutory provision on which FSLIC and the *Hudspeth* decision rely was added as section 5(d)(6)(C) of the Home Owners' Loan Act of 1933. Pub. L. No. 86-695, tit. I, § 101(9), 80 Stat. 1028, 1033 (1966) (codified at 12 U.S.C. § 1464(d)(6)(C) (1982)). FSLIC tends to quote the language of the section in isolation, as follows:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

Id.

But this subpart of subsection 6 of paragraph (d) of section 5 is better understood when read in the context of preceding provisions, which show that the language quoted above is meant to avoid collateral attacks on the receivership through actions restraining the exercise of receivership powers and functions. *See 1966 Senate Hearing* at 319G (FHLBB section-by-section analysis); 112 Cong. Rec. 6,882, 6,891 (1966).

Specifically, subsection 6(A) sets forth the grounds for appointment of a receiver by FHLBB and the express authorization for the institution to bring an action within 30 days in United States district court to challenge the appointment.[37] Subpart 6(B) provides for

[37] Subpart 6(A) concludes by providing: "Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall *stay* such action or proceeding during the pendency of the action for removal of the conservator or receiver." 80 Stat. at 1033 (emphasis added). In this sentence

special circumstances in which a receiver may be appointed without a hearing, such as consent of the institution. Subpart 6(D) outlines the powers of the conservator and provides that the only receiver that FHLBB may appoint for a federal institution is FSLIC.

Subpart 6(C) provides that the institution's authorized challenge within 30 days provided by subpart 6(A) is the exclusive avenue by which the appointment of the receiver may be challenged. The concluding language is meant to avoid unauthorized attacks on the receiver's appointment or collateral actions substantially interfering with the conduct of the receivership.[38]

Moreover, the legislative history of these 1966 amendments provides no indication of any congressional intent or FHLBB request that existing court jurisdiction to determine the validity of claims be removed and exclusive subject matter jurisdiction be vested in FSLIC. To the contrary, as explained above, Congress used great precision with respect to administrative proceedings, hearings, court jurisdiction, judicial review and standards of decision in a number of other places within the amendments, but not here. There is no expression, not a hint,

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Congress expressly considers a limited class of ongoing judicial proceedings—actions in U.S. district court to stay a temporary cease-and-desist order or a petition for review in a U.S. court of appeals of a cease-and-desist order issued after hearing—without expressly affecting court *jurisdiction* over other pending claims against the association. If Congress had intended to divest state and federal courts of jurisdiction generally, it would have done so. Further, the effect of the declaration of receivership is not to strip federal courts of jurisdiction over pending review of other regulatory action but merely to stay those proceedings. Mootness and judicial economy were congressional concerns, not the establishment of exclusive subject matter jurisdiction before the FHLBB. *See 1966 Senate Hearings* at 319G (FHLBB section-by-section analysis).

[38] Potential conflicts between state and federal authorities in the receivership setting have long been an issue of concern. *See, e.g., Pennsylvania v. Williams*, 294 U.S. 176 (1935). It may also arise between judicial and executive authorities. *See, e.g., In re Union Bank*, 176 A.D. 477, 163 N.Y.S. 485 (1917).

that subject matter jurisdiction of the courts was to be drastically reduced.[39]

This statutory setting in not one in which a regulatory agency has been delegated limited authority to effectuate specific congressional intent. Here FSLIC seeks to advance an extraordinary proposition on its own behalf and on behalf of FHLBB that is contrary to both the details and the structure of the governing statutes. Not only did Congress not evidence any intention of divesting from state and federal courts subject matter jurisdiction to determine claims, it provided expressly for state court jurisdiction over claims of investors, creditors and stockholders against the receiver of an insured state-chartered institution. 12 U.S.C. § 1730(k)(1) (1982).

C. *The Bank Protection Act of 1968.*

Finally, in the Bank Protection Act of 1968, Pub. L. No. 90-389, 82 Stat. 294 (1968), Congress amended the National Housing Act of 1934 to authorize FHLBB to appoint FSLIC receiver of insured state-chartered associations, but did not otherwise expand FSLIC's authority to dispose of claims in receivership. These provisions were a response to specific problems then being encountered in Illinois.

The FSLIC had paid out insurance on the deposits of an Illinois savings institution and had a claim to more than 96 percent of the assets of the institution, but FHLBB found the Illinois receiver who was appointed by state authority extremely uncooperative. The FHLBB

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[39] Subsection 6(C) is the complement to new subsection 8, which provided that with respect to the enforcement of orders, FHLBB could apply to a United States district court that would have "*jurisdiction* and power to order and require compliance" but that no other court "shall have *jurisdiction* to affect by injunction or order under this subsection, or to review, modify, suspend, terminate or set aside any such notice or order." 80 Stat. at 1034 (emphasis added). It is significant, in light of FSLIC's insistence that subsection 6(C) should curtail subject matter jurisdiction, that a companion section was written in jurisdictional terms but 6(C) was not.

represented to Congress that it was powerless to deal with such a situation. *See* S. Rep. No. 1263, 90th Cong., 2d. Sess. 9, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2538; *Savings and Loan Receiverships: Hearings on S.3436 Before the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 8, 10-11 (1968) [*"1968 Senate Hearings"*].

Nowhere in the hearings or debate on the Bank Protection Act of 1968 is there any indication that Congress or the FHLBB intended that these amendments strip courts of their traditional jurisdiction.[40] Nowhere is there any declaration that Congress intended to create an exclusively administrative procedure. Neither the language of these amendments nor their legislative history supports FSLIC's proffered construction.

However, the Senate report did discuss the significance of the provisions of section 1464(d)(6)(C) from the Home Owners' Loan Act of 1933. These provisions set forth the grounds for the appointment of a receiver for *federal* institutions and were incorporated by reference in the 1968 amendments to apply to FSLIC receiverships for *state* institutions. S. Rep. No. 1263, 90th Cong., 2d Sess. 9-10, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2538-39. The Senate report explained that the language in section 1464(d)(6)(C) forbids any collateral judicial attack on the appointment of the receiver:

> [S]*ection 5(d) also provides for prompt judicial review of the Board's appointment of the FSLIC as receiver. These provisions would also be extended to the appointment of the FSLIC as receiver for State associations.* Under section 5(d)(6)(A) insured associations are authorized to bring an action to remove the FSLIC as receiver within 30 days after its appointment . . . .

[40] In congressional testimony in 1968, FHLBB's Chairman acknowledged the distinction between the determination of the validity of claims and payment of valid claims. *1968 Senate Hearings* at 8 (statement of John E. Horne, Chairman, FHLBB).

> *The appointment of the FSLIC as receiver by the Board would not otherwise be subject to judicial attack.* Section 5(d)(6)(C) provides that *no court may take any other action toward the removal of a receiver, or, except at the instance of the Board, restrain or affect the exercise or powers or functions of a receiver.*

Id. at 10, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2439 (emphasis added).[41]

Neither in 1968 nor at any time thereafter did Congress amend the court jurisdiction language enacted in 1966, codified as 12 U.S.C. § 1730(k)(1) (1982), and quoted above. Congress continued to contemplate that when an insured state-chartered institution is involved in an action, suit or proceeding involving state law rights and obligations, it, and FSLIC as its receiver, will be subject to state court jurisdiction. With all the intricate and thorough amendments to these sections of the Naitonal Housing Act since 1966, Congress' declaration that

[41] The Senate Report also observed:

> The authority of the FSLIC in this regard would be subject only to the *regulation* of the Federal Home Loan Bank Board and *not* to that *of any State authority*, administrative or judicial, *which may previously have had regulatory authority* with respect to the institution.

S. Rep. No. 1293 at 10, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2539 (emphasis added). *See 1968 Senate Hearings* at 7 (statement of John E. Horne, Chairman, FHLBB).

This language was misinterpreted by the United States Court of Appeals for the Fifth Circuit in *Hudspeth*. The court ignored the material highlighted above that reveals congressional concern and interest. The Senate was seeking to remove any potential for conflict between FSLIC, as receiver appointed by FHLBB, and the state savings and loan commission or any court-appointed conservator, receiver or other legal custodian, *viz.*, any state entity that had been exercising *regulatory* authority. The Fifth Circuit transformed the Senate Report's expression of concern from one regarding state "regulatory authority" to one regarding "other judicial *or* regulatory authorities." *Hudspeth*, 756 F.2d at 1101 (emphasis added).

it was *not* seeking to preempt state court authority remains undisturbed.

D. *Judicial Competence to Determine the Validity of Claims.*

The statutes are replete with references to FSLIC being subject to suit. In only one subsection did Congress specifically express the intent to deprive courts of "jurisdiction" to entertain collateral attacks. 12 U.S.C. § 1464 (d)(8) (1982). And Congress gave precise attention to matters of procedural fairness, administrative hearings and avenues for judicial challenge or judicial review of agency action. In this setting, it is unthinkable that Congress would curtail the subject matter jurisdiction of state and federal courts to determine the validity of claims without doing so expressly and discussing such a change in legislative history.

The powers of a receiver under section 1729(d) of the National Housing Act of 1934 have not changed since its enactment. The authority that section confers is only to carry out the traditional function of a receiver, "to settle, compromise, or release claims," not to "adjudicate" or "determine" disputes on the merits by application of law to facts. *See Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209 (9th Cir. 1987), *petition for cert. filed sub nom. FSLIC v. Stevenson Associates*, 56 U.S.L.W. 3249 (U.S. July 8, 1987) (No. 87-451); *FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. Sup. Ct. J. 294 (Mar. 30, 1988). Further, this section confers authority on FSLIC as receiver, not FHLBB as adjudicator.[42]

Unlike in the other sections of the National Housing Act of 1934 and its 1954, 1966 and 1968 amendments, in section 1729(d) Congress does not provide a method for judicial review of FSLIC or FHLBB actions taken

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[42] Under its recently published "interim procedures" it is FHLBB, not FSLIC, that finally determines claims. 53 Fed. Reg. 13,105 (Apr. 21, 1988).

in connection with the settlement, compromise or release of claims. When Congress intended to authorize FSLIC or FHLBB to take administrative action with Administrative Procedure Act review by the United States district courts in other sections of the National Housing Act, it did so expressly. 12 U.S.C. §§ 1464(d)(7)(A); 1730(j)(2) (1982). The lack of any judicial provision in connection with section 1729(d)'s authorization for the receiver to settle, compromise or release claims confirms that Congress did not intend this language to establish an exclusively administrative claims determination procedure.

Finally, Congress provided the same authority to FSLIC as receiver with respect to claims in favor of as well as claims against the insured institution. It neither intended nor made any fundamental distinction in the jurisdictional and procedural aspects for pursuing both types of matters. Specifically, even FSLIC has not construed section 1729(d) as self-executing authority to declare itself entitled to recovery on disputed claims without first establishing such a claim to the satisfaction of a court. *Cf.* 12 U.S.C. § 1464(d)(8) (1982) (FSLIC authorized to commerce actions to enforce orders and notices). Just as Congress intended FSLIC to be able to settle, compromise and release its claims as receiver without dislocating vast subject matter jurisdiction from the courts, it intended FSLIC to be able to negotiate settlement of claims brought against the savings institution. The subject matter jurisdiction of the courts remains unaffected.

Similarly, section 1464(d)(6)(C) of the Home Owners' Loan Act of 1933 is a prohibition of collateral attacks on FSLIC in its role as a traditional receiver. It is in the nature of an anti-injunctive provision to forestall successive challenges to the appointment of the receiver and to prevent harrassment of the federally-appointed receiver as FSLIC performs its general receivership functions. *See, e.g., Womble v. Dixon*, 585 F. Supp. 728 (E.D. Va. 1983); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988 (D. Haw. 1982); *see gen-*

erally Fidelity Fin. Corp. v. FSLIC, 834 F.2d 741 (9th Cir. 1987) (*dictum*). In the context of its legislative history it cannot be read as more.

Courts traditionally have determined the validity of disputed claims without restraining or affecting a receivership.

> As pointed out in *Riehle v. Margolies*, 279 U.S. 218, 224, the distribution of assets of a debtor among creditors ordinarily has a "two-fold aspect." It deals "directly with the property" when it fixes the time and manner of distribution. No one can obtain part of the assets or enforce a right to specific property in the possession of the liquidation court except upon application to it. *But proof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property."* "The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*." *Id.*, p. 224. *The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court*, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have. And see *Chicago Title & T. Co. v. Fox Theatres Corp.*, 69 F.2d 60.

Morris v. Jones, 329 U.S. 545, 548-49 (1946) (emphasis added). *Accord Riehle v. Margolies*, 279 U.S. 218, 223-24 (1929); *Grant v. Buckner*, 172 U.S. 232 (1898); *First Nat'l Bank of Bethel v. Nat'l Pahquioque Bank*, 81 U.S. (14 Wall.) 383 (1872).[43]

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[43] *Schulenberg v. Norton*, 49 F.2d 578 (8th Cir. 1931):

> The statute provides an easy, speedy manner of determination of claims by permitting such to be presented to a receiver appointed by the Comptroller, *but this is quite different from limiting the ordinary and usual way of determining rights of creditors judicially.*

Id. at 580 (emphasis added). *Cf. Tcherepnin v. Knight*, 389 U.S. 332, 346 (1967) (clear distinction between determination of validity of claims on the one hand and priority of claims on the other).

Moreover, since FSLIC is relying on section 1464(d)(6)(C), it has the remaining problem that the section does not contemplate any judicial review. That section is different from others in the Home Owners' Loan Act of 1933 that provide for agency action and expressly provide for review of such action by a court pursuant to the Administrative Procedure Act. Indeed, section 1464(d)(6)(C) expressly forbids court attention. Accepting FSLIC's interpretation of this section would mean that Congress intended to delegate to the discretion of FSLIC as receiver authority to determine claims that is completely unreviewable, *see* 5 U.S.C. § 701(a)(1) (1982), or, at best, reviewable only under the catchall provisions of section 704 of the Administrative Procedure Act as final agency action "for which there is no other adequate remedy in a court." *Id.* § 704.

In this connection, FHLBB's statements, testimony, explanations and discussions that form part of the legislative history of the Home Owners' Loan Act of 1933, National Housing Act of 1934 and their amendments in 1954, 1966 or 1968 did not explain to Congress that FHLBB or FSLIC was seeking authorization to constitute it or them the exclusive adjudicators of all claims in dispute in FSLIC receiverships.

E. *Prior FHLBB and FSLIC Interpretations.*

The FHLBB and FSLIC conceived their current construction only recently. The argument that FSLIC has been proclaiming since 1984 on behalf of itself and FHLBB does not appear in earlier FSLIC receivership cases.[44]

A review of FHLBB and FSLIC regulations confirms the lack of historical support for FSLIC's new-found posi-

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[44] *Deep Rock Oil Corp. v. Salisbury*, 130 F.2d 387 (8th Cir. 1942); *Community Fed. Sav. & Loan Ass'n v. Fields*, 128 F.2d 705 (8th Cir. 1942); *Town of Texhoma ex rel. Versluis v. Neild*, 9 F.R.D. 739 (W.D. Okla. 1943); *see W-V Enterprises, Inc. v. FSLIC*, 234 Kan. 354, 673 P.2d 1112 (1983); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 547 F. Supp. 988 (D. Haw. 1982).

tion. By 1937, FHLBB had promulgated regulations governing receiverships. The receiver was required to conduct a hearing at the home office of the association at which time any interested person could propose any plan for the disposition of the association's assets. The receiver was to recommend a plan to the FHLBB and, with its approval, proceed to liquidate the association, 24 C.F.R. §§ 204.4-.5 (1938). By 1941, FHLBB had detailed the duties of a receiver. 6 Fed. Reg. 4,413, 4,414-15 (1941) (to be codified at 24 C.F.R. § 204.10(c), (f), (m)). The regulation [45] included provisions for the allowance of claims "proved to the satisfaction of the receiver," *id.* at 4,415 (to be codified at 24 C.F.R. § 204.11 (b)), in language reminiscent of national bank receivership provisions. 12 U.S.C. §§ 193-94 (1982).

After enactment of the Financial Institutions Supervisory Act of 1966, *no* revisions or amendments to these regulations were promptly proposed or promulgated to set forth procedures for exercise of the purportedly exclusive jurisdiction now being claimed.[46] Following enactment of the Bank Protection Act of 1968, FHLBB promulgated new regulations to implement the amendments allowing FHLBB to appoint FSLIC receiver for state-chartered institutions. There is nothing in these regulations indicating that the determination of the validity of claims against an institution in FSLIC receivership is removed from the jurisdiction of the courts. On the contrary, the references to defending legal actions "by and against the Receiver or such institution," 33 Fed. Reg. 14,367 (1968) (to be codified at 12 C.F.R. § 569a.6(a)(3)), indicate the opposite.[47]

[45] After a series of redesignations, these provisions were repromulgated as part 149 of title 24 of the *Code of Federal Regulations* and then as part 549 of title 12, where they remain. *See* 8 Fed. Reg. 1,180 (1943); 13 Fed. Reg. 8,273 (1948); 14 Fed. Reg. 3,980 (1949); 21 Fed. Reg. 4,546, 4,548 (1956); 23 Fed. Reg. 9,877 (1958); 44 Fed. Reg. 39.108, 39,142 (1979).

[46] However, in 1967 FHLBB did promulgate a detailed set of rules of practice and procedure for adjudicatory proceedings. 12 C.F.R. §§ 509.1-.22 (1987). These rules are expressly made applicable to proceedings required for exercise of the other new authority. Conspicuous by its absence is any reference to receivership claims adjudication. See 12 C.F.R. § 509.1 (1987).

Not until November 27, 1985, six months after the Fifth Circuit's reconsidered opinion in *Hudspeth*, which accepted FSLIC's theory, did FHLBB propose extensive revisions to its receivership regulations. 50 Fed. Reg. 48,970 (1985).[48] These "significant" proposals cover a number of substantive law topics, including the effect of receiverships on agreements and the priority of claims, and embrace the *Hudspeth* doctrine. 50 Fed. Reg. at 48,978. These proposed regulations have yet to be promulgated in final form almost two and one-half years after being proposed. Instead, on April 21, 1988, FHLBB published "interim procedures," which it avers have been in effect since July 1, 1986. 53 Fed. Reg. 13,105 (Apr. 21, 1988).[49]

The *Hudspeth* doctrine is a new development. It was not the basis for past administrative construction of these

[47] The 1968 regulations make no provision for judicial review. *Cf.* 12 U.S.C. § 1730(j) (1982) (judicial review provisions for proceedings).

[48] *See also* 1 FEDERAL GUIDE (U.S. League of Savings Institutions) ¶ 11,776, at 3738-39 (1987) (FHLBB, General Counsel Opinion, Mar. 23, 1984) (commenting on what a court would likely hold with respect to possible challenges that FSLIC as receiver might make to provisions of secured transactions contracts entered into by association prior to appointment of receiver); 49 Fed. Reg. 45,065, 45,066 (Nov. 14, 1984) (possible litigation in connection with repurchase agreement).

[49] Without amending its current regulations, see 12 C.F.R. pts. 549, 569a (1987), FHLBB has now published a new set of "interim procedures" declaring FHLBB's decision on claims to be final agency action. 53 Fed. Reg. at 13,110-11. In a purported administrative structure in which appeals must be taken from FSLIC to FHLBB, regulated institutions with a claim against an FSLIC receivership could be intimidated in deciding whether to pursue rights of appeal.

statutes and is not consistent with them. Respondent should not be permitted to "bootstrap" itself into a position of exclusive jurisdiction when it cannot "demonstrate the sort of longstanding, clearly articulated interpretation of the statute which would be entitled to great judicial deference, particularly in light of the clear indications that Congress did not intend to invest the [Respondent] with the authority it is now seeking to assert." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *see Federal Reserve Bd. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986); *FAIC Securities, Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985).

III. The Respondent's Interpretation of the Statutes Raises Significant Constitutional Concerns.

Fundamental fairness requires an impartial and disinterested determination of the validity of claims. Parties have a right to a "neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). *See Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510 (1928).

As receiver FSLIC is not a disinterested factfinder, but has a conflicting financial interest in the outcome of virtually all claims. Every dollar paid out to claimants is a dollar less with which to reimburse FSLIC for payments made as insurer of savings accounts or to repay FSLIC for loans or other monetary assistance to the FSLIC receivership.

Indeed, in seeking to persuade Congress in 1968 to grant it authority to appoint FSLIC receiver for state-chartered institutions, FHLBB argued that FSLIC should be the receiver because, as the institution's principal creditor, it would have great incentive to collect the assets of the institution. John E. Horne, then Chairman of the FHLBB, testified:

> It is clear that *the Corporation, given its huge financial interest in every case, is the most highly motivated party* available to do the job in an orderly and economical way.

1968 Senate Hearings at 10-11 (testimony of John E. Horne, Chairman, FHLBB) (emphasis added). *Accord* S. Rep. No. 1263, 90th Cong., 2d Sess. 7 (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2536; 114 Cong. Rec. 5,339 (1968) (statement of Rep. Patman); *1968 Senate Hearings* at 14, 16 (testimony of John E. Horne, Chairman, FHLBB).

It is just such a "huge financial interest," qualifying FSLIC as a "highly motivated" collector of debts and assets, that must disqualify it from serving as judge and jury for claims being made against the institution in receivership. The statute itself identifies the conflict by directing FSLIC as receiver to act "in the best interest of the association, its savers, *and the Corporation.*" 12 U.S.C. § 1729(b)(1)(A) (1982) (emphasis added). In this setting, with its interest in preserving and replenishing the insurance fund, FSLIC cannot impartially determine the claims of other creditors.[50]

This due process concern, U.S. Const. amend. V, is additional reason to reject FSLIC's proffered construction of the statute as allocating exclusive subject matter jurisdiction to FSLIC and FHLBB. *See Morrison-Knudsen Co.*, 811 F.2d at 1222; *FSLIC v. Glen Ridge I Condominiums, Ltd.*, 31 Tex. S. Ct. J. 294, 296 (1988). The U.S. League submits that these constitutional concerns may be avoided by adhering to an interpretation of the statute that is consistent with its language and legislative history. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 54 U.S.L.W. 5096, 5098-99 (U.S.

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[50] Should FSLIC advert to strains on the insurance fund and general characterizations of the state of the savings and loan industry, the U.S. League respectfully suggests that such matters are not of record in this proceeding. These are not matters of which a court should be asked to take judicial notice. They are subjects better considered by Congress as matters of public and legislative policy. Finally, such arguments are out of place when used to rationalize infringements upon constitutional rights.

July 7, 1986); *Lowe v. SEC*, 472 U.S. 181 (1985); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

CONCLUSION

Based on the arguments set forth above, the United States League of Savings Institutions respectfully requests that the Court reverse.

Respectfully submitted,

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